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No. 07-1223

In the
Supreme Court of the United States

EDWARD NATHANIEL BELL,
PETITIONER,

v.

LORETTA K. KELLY, WARDEN
SUSSEX I STATE PRISON,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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August 7, 2008

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, the Virginia Association of Criminal Defense Lawyers ("VACDL") respectfully requests leave to file the following *amicus curiae* brief in support of petitioner, Edward Nathaniel Bell. Petitioner has consented to the filing of this brief. Respondent has withheld her consent.

VACDL was originally incorporated in 1992 as the Virginia College of Criminal Defense Attorneys, and changed its name in December 2002. VACDL is a statewide organization of Virginia attorneys whose practices are primarily focused on the representation of those accused of criminal violations. It operates exclusively for charitable, educational, and legislative purposes, and has approximately 450 members.

VACDL's mission is to improve the quality of justice in Virginia by seeking to ensure fairness and equality before the law. In particular, VACDL works to protect the individual rights guaranteed by the Virginia and United States Constitutions in criminal cases; resists efforts to curtail those rights; and

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[1] Pursuant to S. Ct. R. 37.6, *amicus* state that no counsel for a party authored any part of this brief, and that no counsel or any other party or entity, other than *amicus*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

encourages, through educational programs and other assistance, cooperation and collaboration among lawyers. To achieve these salutary goals, VACDL participates in legislative matters relating to issues of criminal justice, works with the judiciary to improve the services available to those who appear in court, and provides continuing legal education to practitioners seeking to enhance their skills. VACDL has previously appeared before this Court in cases addressing issues relating to criminal justice issues. *See Walker v. Washington*, No. 05-6942 (2005).

VACDL's members are actively involved in representing defendants in death penalty cases in both trial and post-conviction proceedings. In the course of these representations, VACDL's members have developed expertise in the investigation and presentation of mitigation evidence. By virtue of its members' expertise, and given its knowledge of and experience with Virginia's criminal justice system, VACDL brings an important perspective to the issues before the Court that cannot be adequately appreciated or conveyed by any other party.

This submission underscores the practical importance of this case to death-penalty practitioners and their clients. It also seeks to clarify the contours of this Court's federal habeas jurisprudence and to explain the strong policy reasons why federal courts should not be constrained by the strictures of 28 U.S.C. § 2254(d) when reviewing a claim of constitutional error, based on new evidence developed for the first time in a federal evidentiary hearing, that was not properly adjudicated on its merits by the state court. Where,

as in Mr. Bell's case, a prisoner diligently seeks to develop evidence supporting substantial claims of constitutional error, but is unreasonably denied a full and fair hearing by the state court, VACDL's members have a strong interest in ensuring that their clients' constitutional rights are protected through the federal habeas process. Especially in Virginia, where restrictive procedures often limit a prisoner's ability to develop and prove claims of constitutional error, federal court habeas proceedings are an essential bulwark against arbitrary sentences and convictions. Indeed, when a Virginia death-penalty prisoner raises a claim that can be presented only in post-conviction proceedings, such as a claim for ineffective assistance of counsel, the federal court oftentimes is the only forum where the prisoner has a fair and adequate opportunity to develop evidence and obtain a proper adjudication on the merits of his claim.

Because the decision of the court of appeals below, denying Mr. Bell relief on his Sixth Amendment ineffective assistance claim, misapplies the federal statutory requirements and is out of step with this Court's decisions in *Willams (Terry) v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), VACDL and its members have a strong interest in having that decision corrected. VACDL accordingly supports the petitioner's request that the judgment of the Fourth Circuit be reversed.

For these reasons, VACDL seeks leave to file the attached *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

The federal district court found that, although petitioner diligently attempted to develop and present the factual basis of his ineffective assistance of counsel claim in state habeas proceedings, the state court unreasonably denied petitioner a full and fair hearing. After a federal evidentiary hearing under 28 U.S.C. § 2254(e)(2), at which petitioner developed and presented substantial new evidence, the district court held that the performance of petitioner's trial counsel was constitutionally deficient and that the state court's decision to the contrary was objectively unreasonable. The district court nonetheless viewed itself constrained by 28 U.S.C. § 2254(d) and, rather than reviewing de novo petitioner's ineffective assistance claim based on the new evidence properly developed in the federal proceedings, held the Virginia Supreme Court reasonably determined that trial counsel's deficient performance was not prejudicial. The Fourth Circuit affirmed.

The question presented is:

Did the Fourth Circuit err when it applied the restrictive standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice that was properly received for the first time in a federal evidentiary hearing, which the state court did not have before it and did not consider?

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INTRODUCTION AND SUMMARY OF ARGUMENT

When a state court's decision denying habeas corpus relief on a substantial claim of constitutional error does *not* take into consideration significant, relevant evidence that is later properly developed in a federal evidentiary hearing, the state court has not appropriately adjudicated the claim on its merits, and the federal court should carefully assess the new evidence, reviewing the claim de novo without giving deference to the state court's decision. That conclusion is both logical and legally correct. The court of appeals' decision to the contrary—that federal courts must defer to a state court decision denying habeas relief even when the decision is based on a defective fact-finding process—is wrong and should be reversed. (*See* Section I, below.)

For reasons set forth below, requiring federal courts to vindicate federal constitutional rights, unimpeded by any constraint on their authority to grant habeas corpus relief, when the state court's fact-finding procedures are inadequate, will not overburden the federal judiciary or otherwise improperly interfere with state prerogatives. A federal evidentiary hearing is not authorized unless (i) the prisoner has diligently sought to develop the factual basis of his claims in state court; (ii) the state court's record is inadequate; and (iii) the character and quality of evidence developed in the federal evidentiary hearing is significant enough to give rise to a new claim not properly adjudicated on its merits by the state court. As a practical matter, these threshold requirements are difficult to satisfy and will be met only in rare cases where, as here, the state procedures prevent a prisoner from reasonably

developing the factual basis of his claims on either direct review or in post-conviction proceedings. In these unusual, pristine set of circumstances, where a prisoner has acted diligently but has nonetheless been unreasonably deprived of a full and fair opportunity to present a substantial claim of constitutional error, the federal courts have a solemn obligation to adjudicate the prisoner's claims on their merits, evenhandedly, and with due regard for the important federal constitutional rights at stake. (*See* Section II, below.)

In this case, the federal district court appropriately determined that the Virginia Supreme Court unreasonably denied the petitioner, Mr. Edward Bell, an opportunity to develop the factual basis of his claim of ineffective assistance of counsel. The federal court nonetheless declined to consider the merits of Mr. Bell's claim de novo and instead held that, although trial counsel's performance fell well below the minimum constitutionally required standards, and although the state court's decision was the product of a defective fact-finding process, the Virginia Supreme Court reasonably determined that counsel's defective performance was not prejudicial. That decision misconstrues the statutory requirements and does *not* faithfully apply this Court's settled precedents. If the court below had properly considered the substantial evidence developed in the federal evidentiary hearing and adhered to precedent, there is only one reasonable conclusion—had the jury been able to consider the extensive and powerful mitigation evidence developed on federal habeas, there is a reasonable probability that at least one juror would have refused the death penalty. The court of appeals' decision

below should therefore be reversed. (*See* Section III, below.)

ARGUMENT

I. 28 U.S.C. § 2254(d) Does Not Apply When Significant New Evidence Is Properly Developed In A Federal Evidentiary Hearing.

For reasons explained in petitioner's brief, and for the additional reasons set forth below, 28 U.S.C. § 2254(d)'s limits on federal court authority to grant habeas relief do not apply in the unusual circumstances where a federal court is considering a substantial claim of constitutional error based on new evidence developed and properly presented for the first time in a federal evidentiary hearing under section 2254(e)(2). When a federal court determines that a death-penalty prisoner has acted diligently, and that the state court has unreasonably denied the prisoner a full and fair hearing on his post-conviction claims, the federal court's review is de novo. If the state court's decision is not based on an adequate evidentiary record, the state court cannot have properly adjudicated the claim on its merits, and the federal court is not constrained by the strictures of section 2254(d).

A. Federal Courts Have An Obligation To Protect Against Arbitrary Denials Of Constitutional Rights.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, to restrict federal courts' authority to grant habeas relief when a state court has already determined the merits of a claim of constitutional

error, "*provided* th[e] determination[] does not conflict with federal law or apply federal law in an unreasonable way." *Williams (Terry) v. Taylor*, 529 U.S. 362, 387 (2000) (emphasis added) (quoting H.R. Conf. Rep. No. 104-518, at 111 (1996)). Congress designed AEDPA to serve two fundamental purposes—on one hand, streamlining federal habeas procedures to avoid unnecessary duplicative litigation of claims already fully adjudicated on their merits in state court, while, on the other hand, reaffirming federal courts' overarching responsibility to safeguard federal constitutional rights.

AEDPA's provisions thus reflect Congress's desire to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under the law." *Williams (Terry)*, 529 U.S. at 386. As this Court has noted, AEDPA was intended to correct "abuses of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases." H.R. Rep. No. 104-23, at 8 (1995); *see Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays … and 'to further the principles of comity, finality, and federalism'") (citations omitted). Accordingly, when a state court has properly adjudicated a claim of constitutional error on its merits, AEDPA's provisions "create an independent, high standard" that must be "met before" the "federal court may issue a writ of habeas corpus." *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007); *see also Williams (Terry)*, 529 U.S. at 412-13 (O'Connor, J., concurring) (AEDPA "places a new constraint on the power of a federal habeas court to grant" relief "with respect to claims adjudicated on the merits in state court").

Although AEDPA refined certain aspects of habeas practice and procedure, it left intact the general corpus of habeas law and did not disturb federal courts' authority and solemn obligation to protect against the violation of constitutional rights. *See* U.S. Const., art. I, § 9 cl. 2 ("the Privilege of the Writ of Habeas Corpus shall not be suspended"); *Williams (Terry)*, 529 U.S. at 378-79; *see also* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 398 (1996) (describing Congress's rejection of legislative proposals that would have largely abolished federal habeas corpus). As the Court has recognized, "[e]ven in the context of federal habeas," avoiding re-litigation of decisions properly decided by a state court, "does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also* 141 Cong. Rec. S7846 (daily ed., June 7, 1995) (statement of Sen. Hatch) (it "is absolutely false" to conclude that section 2254 requires deference "even if the State is wrong about the U.S. Constitution"). To the contrary, under AEDPA, "errors that undermine confidence in the fundamental fairness of the state adjudication" justify the issuance of the federal writ. *Williams (Terry),* 529 U.S. at 375. The writ of habeas corpus thus remains, as the Founders intended it, as a vital protection against "arbitrary punishments upon arbitrary convictions." The Federalist No. 83 (A. Hamilton); *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969) (the writ of habeas corpus "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action").

AEDPA's plain language tracks these dual purposes. Section 2254(d) constrains federal court

authority to grant habeas relief "with respect to any claim" that was properly "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). Under the familiar statutory standards, when a state court properly adjudicates a claim on its merits, the federal court may not grant relief unless the state court's decision (i) is contrary to, or involves an unreasonable application of, clearly established federal law; or (ii) is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d)(1) & (2).

AEDPA nonetheless provides that, when a state court does *not* adjudicate a claim on its merits, the federal courts are open to prisoners seeking to vindicate important constitutional rights. *See Williams (Michael) v. Taylor,* 529 U.S. 420, 436-37 (2000). Congress thus recognized that, in limited and defined circumstances, an evidentiary hearing in federal court may be appropriate when a prisoner seeks to press a substantial claim of constitutional error for which the "factual basis" was not developed in the state court proceedings. 28 U.S.C. § 2254(e)(2). A federal evidentiary hearing is permitted if the claim relies on either a new rule of constitutional law "made retroactive," or a "factual predicate that could not have been previously discovered through the exercise of due diligence." *Id*. Similarly, an evidentiary hearing is permitted if the "facts underlying the claim" are "sufficient to establish by clear and convincing evidence that but for [the] constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." *Id*.

As petitioner's brief sets forth in detail, AEDPA's provisions, construed as a whole, do not restrict a federal court's authority to grant habeas relief when (i) a defendant is not afforded a reasonable opportunity to present factual evidence during state court proceedings, and (ii) significant factual evidence giving rise to a new claim, not considered by the state court, is developed in a federal evidentiary hearing under section 2254(e)(2). *See* Pet. Br. 23-39. The point is both logical and fundamental: A federal court cannot meaningfully evaluate a state court's decision as to whether a prisoner is held in violation of clearly established federal law when a claim arising from new, relevant evidence was not considered and, therefore, not adjudicated on the merits by the state court. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2859 (2007) (claim considered de novo where "factfinding procedures upon which the court relied were 'not adequate for reaching reasonably correct results'"); *see also Dugas v. Coplan*, 506 F.3d 1, 6-7 (1st Cir. 2007) (a federal court's review is "de novo" because it "can hardly defer to the state court on an issue that the state court did not address"). Indeed, because the question "whether a state court's decision was unreasonable must be assessed in light of the record the [state] court had before it," *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004), section 2254(d) does not and cannot reasonably apply to a claim based on new factual evidence developed for the first time in federal habeas proceedings.

B. Petitioner's Reading Of The Statutory Requirements Conforms With Precedent And AEDPA's Underlying Purposes.

This straightforward, commonsense interpretation of AEDPA's provisions is supported by authorities from a variety of different contexts. As these authorities recognize, a decision is neither reliable nor objectively reasonable if it is the product of a defective fact-finding process.

Most significantly, this Court has held that section 2254(d) does not apply to issues properly raised on federal habeas that were not examined or resolved by the state court. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing issue of prejudice "de novo" because the state courts "never reached the issue"); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same). Similarly, when considering *Brady* claims, courts have held that section 2254(d)'s restrictions do not apply if substantial new evidence, not considered by the state court, is developed in the course of a federal evidentiary hearing. *See*, *e.g.*, *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (section 2254(d) "does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings"); *see also* Pet. Br. 24-26 (citing other cases).

These decisions are controlling here. There is no meaningful distinction for AEDPA's purposes between a claim of constitutional error not properly adjudicated on its merits because it was never decided by the state court, and an emaciated claim never properly adjudicated on its merits because the

prisoner was unreasonably denied a full and fair opportunity to substantiate the claim with evidentiary support. *See, e.g.*, *Wingo v. Wedding*, 418 U.S. 461, 474 (1974) (recognizing that the "outcome of a lawsuit—and hence the vindication of legal rights"—often turns on how the "factfinder appraises the facts"). Just as state courts may not directly turn a blind eye to the violation of clearly established federal law, they also should not be allowed to do so indirectly by unreasonably declining to consider proffered evidence that a prisoner has diligently sought to develop and put before the court for consideration. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the Constitution "'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections"); *see also* Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and its Limits*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 312-15 (Richard A. Epstein & Michael S. Greve, eds., 2007) (tracing history of the "anti-circumvention principle" as a necessary principle that "operates in just about all statutory settings").

This approach comports with the bedrock principle, long-recognized in other contexts, that a decision is inherently unreasonable if the decisionmaker has "entirely failed to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Assn. of U. S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under the Administrative Procedures Act, 5 U.S.C. § 706, for example, a reviewing court generally may not disturb a decision rendered by an Article II branch administrative agency, unless the decision is unreasonable, arbitrary, or contrary to law. *See 5*

U.S.C. § 706 (2)(A). This Court has nonetheless long recognized that, notwithstanding the substantial deference ordinarily afforded agency decisionmaking, de novo review is appropriate "where there are inadequate fact-finding procedures in adjudicatory proceedings." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also* 5 U.S.C. § 706(2)(F). Accordingly, when a party satisfies the high threshold showing required to demonstrate that an agency's fact-finding procedures are inadequate, the reviewing court is obliged to hold a "de novo hearing," undertake a searching review of the evidence, and "thereafter determine whether the agency action was 'unwarranted by the facts.'" *Camp*, 411 U.S. at 141.

These elemental principles are consistent with AEDPA's clear distinction between, on one hand, limiting a federal court's authority to revisit a claim that a state court has properly adjudicated on its merits, and, on the other, authorizing a federal court to conduct an evidentiary hearing when the factual basis for the claim is not developed in the state court proceedings. *See Panetti*, 127 S. Ct. at 2859 (federal court reviews issues de novo when state court "fact-finding procedures … were 'not adequate for reaching reasonably correct results' or … resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth'"). As long as a death penalty prisoner meets the demanding standards of section 2254(e)(2), the federal court should fairly and fully consider the evidence supporting a claim of constitutional error, without the burden of a heavy, anti-constitutional thumb on the scales in favor of denying habeas relief. *Cf. Vieth*

v. Jubelirer, 541 U.S. 267, 295 (2004) (the "Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms").

Finally, recognizing that a federal court should review de novo claims that are based on new evidence not considered by the state court is consistent with AEDPA's broader, underlying purposes. Comity and federalism concerns are not served by limiting federal courts' authority to grant habeas relief when the state court fact-finding process is unreasonably abbreviated or otherwise defective. *See* Pet. Br. 37-39. Similarly, if a federal court has appropriately granted an evidentiary hearing consistent with the strict requirements of section 2254(e), limiting the federal court's authority to consider and properly evaluate the evidence will do nothing to further AEDPA's goals of reducing delays and expediting the post-conviction review process. *See* Rules Governing § 2254 Cases, Rule 8 (permitting district court judge to refer petition to magistrate, but requiring court to review de novo any proposed findings of fact and recommendations to which any party objects). To the contrary, once an evidentiary hearing is granted, any interest in streamlining the federal habeas process weighs strongly in favor of considering the evidence developed on its own terms—and not in light of whatever coloration might be cast by a prior, inadequate state court procedure. When a prisoner has been unreasonably denied a fair opportunity to prove a claim of constitutional error in state court, it falls to the federal courts to step up and fulfill the "duty" of vindicating the vital "rights secured by the"

federal Constitution. *Williams (Michael)*, 529 U.S. at 436-37.

II. Recognizing Federal Courts' Authority To Review De Novo Claims Based On Evidence Not Considered By The State Court Poses Little Risk Of Overburdening The Federal Judiciary.

A decision recognizing that federal courts are not constrained by section 2254(d) when considering claims based on new evidence developed and presented for the first time on federal habeas will neither overburden the federal judiciary nor improperly interfere with state prerogatives. A petitioner seeking a federal evidentiary hearing on substantial claims of constitutional error must overcome several hurdles. These hurdles ensure that federal courts engage in de novo review in only limited, appropriate circumstances.

A. A Prisoner Must Diligently Seek To Develop The Factual Basis Of His Claims.

Before deciding whether to grant an evidentiary hearing, the federal district court must make a threshold determination that the prisoner has acted diligently to preserve his claims. *See* 28 U.S.C. § 2254(e)(2)(A)(ii). This Court has held that "diligence" under section 2254(e)(2) ordinarily requires the petitioner to make a "reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams (Michael)*, 529 U.S. at 435. At a minimum, the prisoner in the "usual" case must "seek an evidentiary hearing in state court in the manner prescribed by state law." *Id*. at 437.

If a prisoner has been "unable to develop his claim in state court despite diligent effort," however, the state court may have failed its "duty … to vindicate rights secured" by the federal Constitution and a federal evidentiary hearing may be appropriate. *Id*. at 436-37. In this case, for example, the district court held that Mr. Bell "diligently developed the factual basis" of his ineffective assistance claim, as required under section 2254(e)(2). *Bell v. True*, 413 F. Supp. 2d 657, 699 (W.D. Va. 2006). That finding has not been challenged or disputed by the Warden. *See* Pet. Br. 2.

But cases, like this one, where a prisoner has acted with diligence are likely to be rare. As a majority of the members of this Court have recognized, habeas cases requiring evidentiary hearings have been "few in number" and "there is no clear evidence that" such hearings have "burdened the dockets of the federal habeas courts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting); *Schriro v. Landrigan*, 127 S. Ct. 1933, 1954 (2007) (Stevens, J., dissenting). To the contrary, even prior to passage of AEDPA, which restricted federal courts' authority to hold evidentiary hearings, it is estimated that district courts held evidentiary hearings in only 1.17% of all federal habeas cases. *See Schriro*, 127 S. Ct. at 1954 (Stevens, J., dissenting) (citing Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relations to the States (Mar. 12, 1990) (Richard A. Posner, Chair)).

B. The State Court Record Must Be Inadequate.

Even if a prisoner is found to have acted with requisite diligence, a federal evidentiary hearing is not required if the state court has considered the relevant facts. Federal courts are not required "to allow federal habeas applicants to develop … insubstantial factual allegations in evidentiary hearings." *Schriro*, 127 S. Ct. at 1940. Instead, as this Court recently held, if a prisoner seeks to introduce new evidence that would not likely change the result of the state court's decision, the district court has "discretion to deny an evidentiary hearing." *Id.* at 1944. An evidentiary hearing is not required on issues that can be fairly resolved by reference to the state court record. *See id.* at 1940.

Numerous states have adopted procedures designed to ensure that death penalty prisoners are afforded a full and adequate hearing through the state habeas process. *See* Jordan Steiker, *Restructuring Post-conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F. 315, 342 (1998) (describing how federal habeas review has created incentives for states to expand their own post-conviction procedures). In some states, such as North Carolina, for example, there are robust statutory or constitutional entitlements to discovery. *See*, *e.g.*, N.C. Gen. Stat. § 15A-1415(f); *State v. Bates*, 348 N.C. 29, 38 (1998). Similarly, in other states, such as Arizona and Louisiana, the state legislatures have codified post-conviction measures that authorize trial courts to order appropriate evidentiary hearings in post-conviction proceedings.

See, *e.g.*, Ariz. Rev. Stat. § 13-4238 (a "defendant is entitled to a hearing to determine issues of material fact"); La Code Crim. P. Art. 930 (an "evidentiary hearing … shall be ordered whenever there are questions of fact which cannot properly be resolved" on the pleadings or through summary disposition).

Virginia has taken a different approach. In 1995, the Virginia General Assembly amended its state habeas statute to impose restrictive time limits on the filing of state habeas petitions, and provided the Virginia Supreme Court with exclusive jurisdiction over petitions filed by inmates on death row. *See* 1995 Va. Laws Ch. 503; Va. Code Ann. § 8.01-654 (granting the Virginia Supreme Court "exclusive jurisdiction to consider and award writs of habeas corpus"). With these statutory changes, the Virginia General Assembly directed that habeas petitioners are entitled to evidentiary hearings only upon "order of the [Virginia] Supreme Court." Va. Code Ann. § 8.01-654.

The decision to grant an evidentiary hearing in Virginia is therefore not made by the trial judge who issued the death sentence. Accordingly, under Virginia's statutory scheme, the court that is most familiar with the trial proceedings, and in the best position to assess the appropriateness of a post-conviction evidentiary hearing, has no authority to order one. *See Massaro v. United States,* 538 U.S. 500, 506 (2003) (noting that the judge who :observed the earlier trial" has "an advantageous perspective for determining the effectiveness of counsel's conduct"; *Koon v. United States*, 518 U.S. 81, 98 (1996) (district courts "have an institutional advantage over appellate courts" in making decisions requiring a "refined assessment" of issues arising

from the fact-specific circumstances of a case). Instead, the decision to grant an evidentiary hearing rests exclusively in the hands of seven appellate justices who, of necessity, must collectively reach their decision based on a cold record.

Given this, it is perhaps not surprising that the 1995 revisions to Virginia law have significantly reduced the number of evidentiary hearings granted during the state habeas process. A search of published and unpublished decisions in the Westlaw legal database show that, before the 1995 change in Virginia law, at least 33 out of 67 death row prisoners (roughly 49%) were afforded evidentiary hearings. In stark contrast, between 1995 and July 2008, a search of both the Westlaw legal database and the unpublished decisions available on the Virginia Supreme Court's official website, suggest that only 5 out of 57 petitioners (roughly 9%) were permitted an evidentiary hearing in which to develop the factual basis of their claims. *See Hedrick v. Warden*, 570 S.E.2d 840, 845 (2002); *Lovitt v. Warden*, 585 S.E.2d 801, 805 (2003); *Yarbrough v. Warden*, 609 S.E.2d 30, 32 (2005); *Lenz v. Warden*, 593 S.E.2d 292, 296 (2004); *Lewis v. Warden*, 645 S.E.2d 492 (2007). The upshot of the 1995 changes to Virginia's habeas law, at least in the view of some commentators, has been a drastic curtailment of prisoners' ability to fully and fairly adjudicate their claims on the merits. As one experienced observer has suggested, the Virginia Supreme Court "never grants any resources to the attorneys who are litigating the cases, denies every request for expert assistance, denies every request for discovery, denies every motion of any consequence, and then dismisses every petition without an evidentiary hearing."

Frank Green, *State's Executions Reaching a Peak Under Gilmore, As Attorney General He Speeded Process*, Richmond Times Dispatch, Dec. 13, 1998, at C-1.

Whatever the accuracy of these observations as a general matter, they undoubtedly apply in Mr. Bell's particular case. As the district court found, the "fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" on Mr. Bell's ineffective assistance claim. 413 F. Supp. 2d at 699. In fact, before arriving in federal court, Mr. Bell was denied any reasonable opportunity to substantiate his post-conviction claims. *See Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (2001) ("[c]laims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal"). Although Mr. Bell sought leave to exceed the court-imposed 50-page limit on petitions for habeas relief, *see* Va. S. Ct. Rule 5:7A(g); requested an evidentiary hearing, *see* Va. Code § 8.01-654(C), Va. S. Ct. Rule 5:7A(h); sought discovery, *see* Va. S. Ct. Rule 4:1(b)(5); requested the appointment of investigators and mental health experts to assist in the presentation of his claims, *see* Va. Code § 19.2-264.3:1-2; and asked leave to amend the record, *see* Va. S. Ct. Rule 1:8, these requests were all summarily denied. Equally significant, the Virginia Supreme Court disposed of Mr. Bell's petition, without a hearing, even though it resolved important factual disputes against Mr. Bell and in favor of the Warden, and then granted the Warden's motion to dismiss. *See* Pet. Br. 57-58; *cf. Walker v. Young*, No. CL04-54, 2004 WL 1858702, at *3 (Va. Cir. Ct. Aug. 6, 2004) ("where a motion to dismiss has been filed,

the prisoner, as the non-moving party, must be given the benefit of all inferences").

These abbreviated procedures ensured that Mr. Bell was not able to develop his post-conviction claim of ineffective assistance until he was afforded the opportunity for the first time in federal court. There is no requirement that a state provide full and fair evidentiary hearings as part of the state habeas process. Nonetheless, when a state fails to do so and the factual bases for a claim are properly developed in federal proceedings, nothing should restrict the federal court's authority or otherwise prevent it from granting appropriate relief.

C. The Evidence Must Be Sufficient To Give Rise To A New Claim.

Even if a prisoner has acted with diligence, and even if a federal evidentiary hearing is warranted, the federal court is not required to conduct de novo review unless the factual record developed in the federal habeas proceedings gives rise to a new claim that has not been adjudicated on the merits within the meaning of section 2254(d).

As petitioner's brief explains, a prisoner on federal habeas must come forward with sufficient evidence and aggregate facts to support a substantial claim of constitutional error. *See* Pet. Br. 26-35. If the facts developed on federal habeas are significant and sufficiently different from the facts considered by the state court, the newly developed facts effectively give rise to a new "claim" that was not adjudicated on its merits and should be considered de novo by the federal court.

Here, again, the point is a logical one: when the evidence developed on federal habeas does not

meaningfully expand on the facts considered by the state court, a federal court's authority is appropriately constrained by section 2254(d); in contrast, where, as here, the evidence is significant and the state court improperly declined to consider it, de novo review is warranted.

III. If The Evidence In This Case Is Reviewed De Novo, It Is Clear That Trial Counsel's Deficient Performance Was Prejudicial Under *Strickland*.

Three times in the past eight years, this Court has vacated capital sentences on grounds that a state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), where defense counsel failed to investigate or present significant mitigating evidence. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000). This case is closely analogous to, and is controlled by, these authorities. Had the jury been able to place Mr. Bell's history of childhood abuse and cognitive impairments "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 513.

The Fourth Circuit erred by characterizing the evidence developed by Mr. Bell as "cross-purpose" evidence and, therefore, not relevant to establishing prejudice under *Strickland*. But, as petitioner's brief explains, that characterization does not reasonably describe the extensive mitigation evidence presented in the federal habeas proceedings. *See* Pet. Br. 53-55. It is also legally incorrect. The mitigating evidence on which the Court relied in *Rompilla*,

Wiggins, and *Williams* readily could have been characterized as "cross-purpose" evidence, but that fact was not relevant. As courts have recognized, it is "nearly always the case" that evidence in mitigation could be characterized as double-edged or as opening the door to some "harmful information." *Outten v. Kearney*, 464 F.3d 401, 422 (3d Cir. 2006).

It is precisely for these reasons that this Court has held that, where, as here, a prisoner's counsel has rendered defective performance and failed to develop substantial mitigating evidence, the prisoner has satisfied *Strickland*'s prejudice prong. A Virginia jury may return a death sentence only upon a unanimous verdict, and each individual juror is free to refuse the death penalty. *See* Va. Code Ann. §§ 19.2-264.2, 19.2-264.4 (2007). Accordingly, the jury in this case should have been given the opportunity to consider the extensive mitigating evidence that could well have convinced a single juror to refuse the death penalty and grant mercy.

The Fourth Circuit's decision below reflects its continued refusal to acknowledge the prejudicial effect of counsel's failure to investigate and present available mitigating evidence. On matters as fundamental as the right to effective assistance of counsel, this continued failure to faithfully abide by this Court's precedents should not be left undisturbed.

* * *

This Court's modern death-penalty jurisprudence makes clear that, if the death penalty is to retain its utility as a condign punishment society is prepared to mete out in response to the most heinous crimes against the social order, it must

be applied fairly, reliably, and consistent with federal constitutional requirements. In turn, Congress has determined that when state court fact-finding procedures are inadequate, federal courts are authorized to conduct evidentiary hearings to allow evidence to be developed and presented on substantial claims of constitutional error. For those hearings to be meaningful, the federal court's review of claims, based on the evidence properly developed in the federal evidentiary hearing and not considered by the state court, must be conducted de novo and unconstrained by the strictures of AEDPA's section 2254(d).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit and remand with instructions to grant habeas relief.

Respectfully submitted,

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